Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
City of Wilson Petition, Pursuant to Section 706 of the Telecommunications Act of 1996, Seeking Preemption of State Laws Restricting the Deployment of Certain Broadband Networks	)	WCB Docket Nos. 14-115

COMMENTS OF THE STATE OF NORTH CAROLINA

The State of North Carolina, by Roy A. Cooper, Attorney General of North Carolina, respectfully submits these comments in response to the *Notice of Electric Power Board and City of Wilson Petitions, Pursuant to Section 706 of the Telecommunications Act of 1996, Seeking Preemption of State Laws Restricting the Deployment of Certain Broadband Networks,* WCB Docket Nos. 14-115 and 14-116, released July 28, 2014.

This matter concerns whether the Commission has authority through 47 U.S.C. 1302 (Section 706) to preempt Session Law 2011-84 (N.C.G.S. §160A-340 et seq.).[1] There are policy-based arguments reflecting several viewpoints regarding municipal broadband services that are well known to the Commission, but the policy issues are not determinative.[2] The State anticipates comments in this proceeding from its legislators regarding the policy, purpose and intent of S.L. 2011-84.

A variety of theories have been found to support federal preemption of state law (*See*

[1] SL 2011-84, An Act to Protect Jobs and Investment by Regulating Local Government Competition with Private Business codified as Article 16A of Chapter 160A of the General Statutes. See Attachment A.

[2] *See*, e.g. *Nixon v. Missouri Municipal League et al.*, 541 U.S. 125 (2004) majority opinion and Justice Stevens' dissent regarding policy issues presented by the parties. Where, in dissent, Justice Stevens acknowledged that the legal outcome did not turn on which side had the better policy debate.

generally La. Pub. Service Com. v. FCC, 476 U.S. 355, 368-69 (1986)).[3] Only one of these preemption theories is presented in this proceeding: that S.L. 2011-84 "stands as an obstacle to the accomplishment and execution of the full objectives of Congress."[4]

Principles of federalism woven throughout our laws preserve state authority over local matters; hence "interfering with the relationship between a State and its political subdivisions strikes near the heart of State sovereignty."[5] S.L. 2011-84 regulates cities which are creatures of state authority and control, in matters of state sovereignty and the state's constitution. The federal government has no special expertise in or tradition of regulation city governments within the relevant contexts of this proceeding, how cities finance those activities, the state laws they must comply with, and protections afforded local citizens and taxpayers.

I. SECTION 601(c) PRECLUDES PREMPTION THROUGH SECTION 706 WITH REGARD TO S.L. 2011-84

Two fundamental principles guide any determination of whether Section 706 grants preemptive power to the Commission: *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) requires Congress's intent to be "unmistakably clear" when it intends to grant preemptive power that would interfere with a state's control of it municipalities[6] and Section 601(c) of the Telecommunications Act of 1996 dictates that the Act cannot be construed to grant preemptive

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[3] Preemption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law, *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977), when there is outright or actual conflict between federal and state law, e.g., *Free v. Bland*, 369 U.S. 663 (1962), where compliance with both federal and state law is in effect physically impossible, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963), where there is implicit in federal law a barrier to state regulation, *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983), where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947), or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. *Hines v. Davidowitz*, 312 U.S. 52 (1941). Pre-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation. *Fidelity Federal Savings & Loan Assn. v. De la Cuesta*, 458 U.S. 141 (1982); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984).

[4] Wilson Petition at 43; e.g. Part III, A and B.

[5] *City of Abilene v. FCC*, 164 F.3d 49, 52 (D.C. Cir. 1999)

[6] See also *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) ("If Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." (internal quotations and citations omitted))

power absent express language stating so

A. Traditional Preemption Analysis

Courts begin the analysis of express or implied preemption "with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). The most direct authority for federal preemption relies upon an express statement from Congress that the agency has such power.[7] If Congress intends to preempt a power traditionally exercised by a state or local government, "it must make its intention to do so 'unmistakably clear in the language of the statute."' *Gregory v. Ashcroft*, 501 U.S. 452,460 (1991) (*quoting Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989)). Therefore, if Congress seeks to "upset the usual constitutional balance of federal and state powers," Congress must "make its intention clear and manifest."[8]

The Supreme Court extended this doctrine to protect a state's prerogative to prohibit municipalities from offering telecommunications services in *Nixon v. Missouri Municipal League*.[9] The Court noted that "preemption would come only by interposing federal authority between a State and its municipal subdivisions."[10] The *Nixon* court recognized that municipalities "'are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in its absolute discretion."'[11] The Court concluded that Congress did not intend to preempt the state's control of its municipalities.[12]

Section 706 does not include express language intended to grant the Commission the power to preempt state laws. Section 706(a) reads in its entirety:

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[7] *La. Pub. Service Com. v. FCC*, 476 U.S. 355, 368 (1986) *citing Jones v. Rath Packing Co.*, 430 U.S. 519 (1977).
[8] *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (internal quotation and citation omitted).
[9] *Nixon v. Missouri Municipal League*, 541 U.S. 125, 128-29 (2004).
[10] *Id.* at 140 (quoting *Wisc. Public Intervenor v. Mortier*, 501 U.S. 597, 607- 08 (1991)).
[11] *Id.* at 140 (quoting *Wisc. Public Intervenor v. Mortier*, 501 U.S. at 607-08).
[12] *Id.* at 141

> In general. The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.[13]

Section 706(b) reads in its entirety:

> Inquiry. The Commission shall, within 30 months after the date of enactment of this Act, and annually thereafter, initiate a notice of inquiry concerning the availability of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) and shall complete the inquiry within 180 days after its initiation. In the inquiry, the Commission shall determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. If the Commission's determination is negative, it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure Investment and by promoting competition in the telecommunications market.[14]

The words "preempt" or "supersede," or similar expressions of preemptive power are not found in Section 706. Thus, any interpretation of Section 706 as a grant of preemptive power contradicts Section 60l(c)'s prohibition on construing the Telecommunications Act to include an implicit grant of preemptive power.

The State acknowledges that the Commission previously determined that Section 706 conveys some direct authority[15], and that this was confirmed based on deference to the Commission's interpretation in *Verizon v. FCC*, 740 F.3d 623, 637 (D.C. Cir. 2014). The *Verizon* court concluded that Section 706(a) was ambiguous,[16] and that Section 706(b) was equally ambiguous.[17] Based on deference to agency decisions under *Chevron USA. Inc. v. Natural Res.*

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[13] Telecommunications Act of 1996, §706(a), 47 U.S.C. § 1302(a).
[14] Telecommunications Act of 1996, §706(b), 47 U.S.C. § 1302(b).
[15] 25 FCC Rcd 17905, In re Preserving the Open Internet; Broadband Industry Practices
[16] *Verizon v. FCC* 740 F.3d at 637-38
[17] *Verizon v. FCC* 740 F.3d at 641

Def. Council, Inc., 467 U.S. 837, 844 (1984) the court deferred to the FCC's interpretation that the statute granted authority through the Commission's ancillary jurisdiction to establish certain requirements of fixed and mobile broadband providers.[18] The State argues that the *Verizon* court forecloses arguments that 706(a) may be construed to grant preemptive power as to S.L. 2011-84: i.e. syllogistically, a statute that is ambiguous as to a grant of any power, is at least equally ambiguous as to a grant of preemptive power – especially in light of the limits on preemption of a sovereign state's regulation of political subdivisions.[19]

There is an additional barrier to any attempt to construe Section 706(a) as a grant of preemptive power. Section 706(a) authorizes the Commission *and State commissions* to encourage advance telecommunications capability by utilizing "measures" and "other regulatory methods."[20] It would be illogical to construe Section 706(a) as a grant of preemptive power when the Congress directed the Commission *and the State commission* to accomplish Congressional intent.

In sum, Section 706(a)'s inclusion of State commissions logically forecloses an interpretation that the section grants preemptive power to the FCC over state laws.

B. Section 601(c) and the *Rice* Doctrine Preclude the Commission From Construing Section 706 as a Grant of Preemptive Power.

The Commission's construction of Section 706 is constrained by Section 601(c) and the *Rice* doctrine. The Commission's interpretation of Section 706 still must be reasonable.[21] "Because the range of permissible interpretations of a statute is limited by the extent of its ambiguity, an agency cannot exploit some minor unclarity to put forth a reading that diverges from any realistic meaning

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[18] *Verizon v. FCC* 740 F.3d at 641. The rules include transparency, anti-blocking, and anti-discrimination requirements.
[19] Accord *La. Pub. Serv. Comm'n*, 476 U.S. at 374 ("[A]n agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it.").
[20] Telecommunications Act of 1996, §706(a), 47 U.S.C. §1302(a).
[21] See *Chevron US.A. Inc. v. Natural Res. Def Council, Inc.*, 467 U.S. 837, 844 (1984) (reasonable interpretation); see also *New York v. FCC*, 486 U.S. at 64 (reasonable accommodation).

of the statute lest the agency's action be held unreasonable."[22] Moreover, traditional presumptions about the parties or the topic in dispute may limit the breadth of ambiguity[.]"[23]

Section 601(c) of the Telecommunications Act states:[24]

- No implied effect. This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.
- State tax savings provision. Notwithstanding paragraph (1), nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede, or authorize the modification, impairment, or supersession of, any State or local law pertaining to taxation, except as provided in sections 622 and 653(c) of the Communications Act of 1934 and section 602 of this Act.

Congress' intent and purpose is clearly set forth in 47 U.S.C. 1301; e.g. "deployment and adoption of broadband technology has resulted in enhanced economic development and public safety for communities across the Nation, improved health care and educational opportunities, and a better quality of life for all Americans", and "encourage and support the partnership of the public and private sectors in the continued growth of broadband services and information technology for the residents and businesses of the Nation."[25] These Congressional purposes are further explained in the House Conference report wherein the Commission is to find incentives to states encouraging broadband deployment.[26] Section 706 directs the FCC to make inquiry concerning the availability of advanced telecommunications capability to all Americans, to determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion, and, if the FCC's determination is negative, to take "immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market." It is this "removing barriers" language that

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[22] *Massachusetts*, 93 F.3d at 893.
[23] *Massachusetts*, 93 F.3d at 893
[24] 47 U.S.C. §152 (note regarding applicability of consent decrees and other law); see 110 Stat. 56, 143 (1996)
[25] 47 U.S.C. 1301(1, 4).
[26] H.R. Conf. Rep. No. 104-458, 104th Cong. 2d Sess. 1996 at 210, stating that the Commission is to provide incentives to accelerate infrastructure investment pursuant to Section 706.

Petitioners rely on in urging preemption.

Section 601(c) presents a self-limiting interpretive canon: to wit, "no implied effect", therefore any ambiguity in the Telecommunication Act of 1996 cannot be construed as an authorization of preemption. The *Rice* doctrine makes interpretation of Section 706 as a grant of preemptive power unreasonable.[27] In *Nixon, supra.* the Supreme Court ruled that a state's regulation of its municipalities would not be preempted by federal law absent "unmistakably clear" intent from Congress.[28] Section 706 lacks such clear intent, and this absence precludes the Commission from construing Section 706 as a grant of preemptive power. In sum, Section 601(c) and the *Rice* doctrine circumscribe the scope of ambiguity in Section 706, and render unreasonable an interpretation that the statute grants preemptive power to the Commission.

The FCC previously conceded that Section 601(c) dictates that "the 1996 Act is not to be construed to impliedly preempt state or local law." *In re Public Utility Commission of Texas*, 13 FCC Rcd 3460, 3485 (1997); *see also City of Dallas v. FCC*, 165 F.3d 341 (5th Cir. 1999) (relying on Section 601(c) in striking down FCC's preemption of local franchise authority for "open video system" operators, rejecting FCC argument that local franchises would undermine the objectives of Congress.). The Commission also stated that it had "no intention of impairing states' or local governments' ability to carry out these duties . . ."[29] when construing Section 706(a).

Hence, Section 601(c) explicitly forecloses Wilson's argument that Section 706 may be read to expressly or impliedly grant the FCC authority to preempt S.L. 2011-84.

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[27] See *Id.* (declaring agency's interpretation that statute was preemptive as unreasonable in light of presumption against federal preemption in areas of traditional state concern).

[28] *Nixon*, 541 U.S. at 140-41.

[29] 25 FCC Rcd 17905, In re Preserving the Open Internet; Broadband Industry Practices, at n374. "We recognize, for example, that states play a vital role in protecting end users from fraud, enforcing fair business practices, and responding to consumer inquiries and complaints. See, e.g., *Vonage Order*, 19 FCC Rcd at 22404-05, para. 1. We have no intention of impairing states' or local governments' ability to carry out these duties unless we find that specific measures conflict with federal law or policy. In determining whether state or local regulations frustrate federal policies, we will, among other things, be guided by the overarching congressional policies described in Section 230 of the Act and Section 706 of the 1996 Act. 47 U.S.C. §§ 230, 1302."

II. S.L. 2011-84 IS NOT AN OBSTACLE TO CONGRESS'S INTENT AS EXPRESSED IN SECTION 706

The State acknowledges the potential for federal preemption of state laws as described in *Hines v. Davidowitz*, 312 U.S. 52 (1941). *Hines* is relevant authority when state laws stand as an obstacle to the accomplishment and execution of the full objectives of Congress.

The plain language of Section 706 as well as the House Conference Report make clear that federal *and* state authorities participate in accomplishing the intent, purpose and objectives presented by Congress; e.g. to increase broadband deployment and availability to all citizens. In *Hines*, the Court described such preemption principles:

> There is not -- and from the very nature of the problem there cannot be -- any rigid formula or rule which can be used as a universal pattern to determine the meaning and purpose of every act of Congress. This Court, in considering the validity of state laws in the light of treaties or federal laws touching the same subject, has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference. But none of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked formula.[30]

Given the Court's description, this paradigm must be considered, if at all, within the context of Congressional intent and whether S.L. 2011-84 presents obstacles to achieving Congressional objectives. Section 706 does not address protection of citizens, but only provisioning broadband for subscribing citizens and consumers.

[30] *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941), where the standard for review is stated as: "Our primary function is to determine whether, under the circumstances of this particular case, Pennsylvania's law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

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Respectfully submitted,

THE STATE OF NORTH CAROLINA

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Attachment A

AN ACT TO PROTECT JOBS AND INVESTMENT BY REGULATING LOCAL GOVERNMENT COMPETITION WITH PRIVATE BUSINESS.

Whereas, certain cities in the State have chosen to compete with private providers of communications services; and

Whereas, these cities have been permitted to enter into competition with private providers as a result of a decision of the North Carolina Court of Appeals rather than legislation enacted by the General Assembly; and

Whereas, the communications industry is an industry of economic growth and job creation; and

Whereas, as expressed in G.S. 66-58, known as the Umstead Act, it is against the public policy of this State for any unit, department, or agency of the State, or any division or subdivision of a unit, department, or agency of the State, to engage directly or indirectly in the sale of goods, wares, or merchandise in competition with citizens of the State; and

Whereas, to protect jobs and to promote investment, it is necessary to ensure that the State does not indirectly subsidize competition with private industry through actions by cities and to ensure that where there is competition between the private sector and the State, directly or through its subdivisions, it exists under a framework that does not discourage private investment and job creation; Now, therefore,

The General Assembly of North Carolina enacts:

SECTION 1.(a) Chapter 160A of the General Statutes is amended by adding a new Article to read as follows:

"Article 16A.

"Provision of Communications Service by Cities.

"§ 160A-340. Definitions.

The following definitions apply in this Article:

(1) City-owned communications service provider. – A city that provides communications service using a communications network, whether directly, indirectly, or through an interlocal agreement or a joint agency.

(2) Communications network. – A wired or wireless network for the provision of communications service.

(3) Communications service. – The provision of cable, video programming, telecommunications, broadband, or high-speed Internet access service to the public, or any sector of the public, for a fee, regardless of the technology used to deliver the service. The terms "cable service," "telecommunications service," and "video programming service" have the same meanings as in G.S. 105-164.3. The following is not considered the provision of communications service:

a. The sharing of data or voice between governmental entities for internal governmental purposes.

b. The remote reading or polling of data from utility or parking meters, or the provisioning of energy demand reduction or smart grid services for an electric, water, or sewer system.

c. The provision of free services to the public or a subset thereof.

(4) High-speed Internet access service. – Internet access service with transmission speeds that are equal to or greater than the requirements for basic broadband tier

1 service as defined by the Federal Communications Commission for broadband data gathering and reporting.

(5) Interlocal agreement. – An agreement between units of local government as authorized by Part 1 of Article 20 of Chapter 160A of the General Statutes.

(6) Joint agency. – A joint agency created under Part 1 of Article 20 of Chapter 160A of the General Statutes.

"§ 160A-340.1. City-owned communications service provider requirements.

(a) A city-owned communications service provider shall meet all of the following requirements:

(1) Comply in its provision of communications service with all local, State, and federal laws, regulations, or other requirements applicable to the provision of the communications service if provided by a private communications service provider.

(2) In accordance with the provisions of Chapter 159 of the General Statutes, the Local Government Finance Act, establish one or more separate enterprise funds for the provision of communications service, use the enterprise funds to separately account for revenues, expenses, property, and source of investment dollars associated with the provision of communications service, and prepare and publish an independent annual report and audit in accordance with generally accepted accounting principles that reflect the fully allocated cost of providing the communications service, including all direct and indirect costs. An annual independent audit conducted under G.S. 159-34 and submitted to the Local Government Commission satisfies the audit requirement of this subdivision.

(3) Limit the provision of communications service to within the corporate limits of the city providing the communications service.

(4) Shall not, directly or indirectly, under the powers of a city, exercise power or authority in any area, including zoning or land-use regulation, or exercise power to withhold or delay the provision of monopoly utility service, to require any person, including residents of a particular development, to use or subscribe to any communications service provided by the city-owned communications service provider.

(5) Shall provide nondiscriminatory access to private communications service providers on a first-come, first-served basis to rights-of-way, poles, or conduits owned, leased, or operated by the city unless the facilities have insufficient capacity for the access and additional capacity cannot reasonably be added to the facilities. For purposes of this subdivision, the term "nondiscriminatory access" means that, at a minimum, access shall be granted on the same terms and conditions as that given to a city-owned communications service provider.

(6) Shall not air advertisements or other promotions for the city-owned communications service on a public, educational, or governmental access channel if the city requires another communications service provider to carry the channel. The city shall not use city resources that are not allocated for cost accounting purposes to the city-owned communications service to promote city-owned communications service in comparison to private services or, directly or indirectly, require city employees, officers, or contractors to purchase city services.

(7) Shall not subsidize the provision of communications service with funds from any other noncommunications service, operation, or other revenue source, including

any funds or revenue generated from electric, gas, water, sewer, or garbage services.

(8) Shall not price any communications service below the cost of providing the service, including any direct or indirect subsidies received by the city-owned communications service provider and allocation of costs associated with any shared use of buildings, equipment, vehicles, and personnel with other city departments. The city shall, in calculating the costs of providing the communications service, impute (i) the cost of the capital component that is equivalent to the cost of capital available to private communications service providers in the same locality and (ii) an amount equal to all taxes, including property taxes, licenses, fees, and other assessments that would apply to a private communications service provider, including federal, State, and local taxes; rights-of-way, franchise, consent, or administrative fees; and pole attachment fees. In calculating the costs of the service the city may amortize the capital assets of the communications system over the useful life of the assets in accordance with generally accepted principles of governmental accounting.

(9) The city shall annually remit to the general fund of the city an amount equivalent to all taxes or fees a private communications service provider would be required to pay the city or county in which the city is located, including any applicable tax refunds received by the city-owned communications service provider because of its government status and a sum equal to the amount of property tax that would have been due if the city-owned communications service provider were a private communications service provider.

(b) A city-owned communications service provider shall not be required to obtain voter approval under G.S. 160A-321 prior to the sale or discontinuance of the city's communications network.

"§ 160A-340.2. Exemptions.

(a) The provisions of G.S. 160A-340.1, 160A-340.4, 160A-340.5, and 160A-340.6 do not apply to the purchase, lease, construction, or operation of facilities by a city to provide communications service within the city's corporate limits for the city's internal governmental purposes, including the sharing of data or voice between governmental entities for internal governmental purposes, or within the corporate limits of another unit of local government that is a party with the city to an interlocal agreement under Part 1 of Article 20 of Chapter 160A of the General Statutes for the provision of internal government services.

(b) The provisions of G.S. 160A-340.1, 160A-340.4, and 160A-340.5 do not apply to the provision of communications service in an unserved area. A city seeking to provide communications service in an unserved area shall petition the North Carolina Utilities Commission for a determination that an area is unserved. The petition shall identify with specificity the geographic area for which the designation is sought. Any private communications service provider, or any other interested party, may, within a time established by order of the Commission, which time shall be no fewer than 30 days, file with the Commission an objection to the designation on the grounds that one or more areas designated in the petition is not an unserved area or that the city is not otherwise eligible to provide the service. For purposes of this subsection, the term "unserved area" means a census block, as designated by the most recent census of the U.S. Census Bureau, in which at least fifty percent (50%) of households either have no access to high-speed Internet service or have access to high-speed Internet service only from a satellite provider. A city may petition the Commission to serve multiple contiguous unserved areas in the same proceeding.

(c) The provisions of G.S. 160A-340.1, 160A-340.3, 160A-340.4, 160A-340.5, and 160A-340.6 do not apply to a city or joint agency providing communications service as of January 1, 2011, provided the city or joint agency limits the provision of communications service to any one or more of the following:

(1) Persons within the corporate limits of the city providing the communications service. For the purposes of this subsection, corporate limits shall mean the corporate limits of the city as of April 1, 2011, or as expanded through annexation.

(2) Existing customers of the communications service as of April 1, 2011. Service to a customer outside the service area of the city or joint agency who is also a public entity must comply with the open bidding procedures of G.S. 143-129.8 upon the expiration or termination of the existing service contract.

(3) The following service areas:

a. For the joint agency operated by the cities of Davidson and Mooresville, the service area is the combined areas of the city of Cornelius; the town of Troutman; the town of Huntersville; the unincorporated areas of Mecklenburg County north of a line beginning at Highway 16 along the west boundary of the county, extending eastward along Highway 16, continuing east along Interstate 485, and continuing eastward to the eastern boundary of the county along Eastfield Road; and the unincorporated areas of Iredell County south of Interstate 40, excluding Statesville and the extraterritorial jurisdiction of Statesville.

b. For the city of Salisbury, the service area is the municipalities of Salisbury, Spencer, East Spencer, Granite Quarry, Rockwell, Faith, Cleveland, China Grove, Landis and the corridors between those cities. The service area also includes the economic development sites, public safety facilities, governmental facilities, and educational schools and colleges located outside the municipalities and the corridors between the municipalities and these sites, facilities, schools, and colleges. The corridors between Salisbury and these municipalities and these sites, facilities, schools, and colleges includes only the area necessary to provide service to these municipalities and these sites, facilities, schools, and colleges and shall not be wider than 300 feet. The elected bodies of Spencer, East Spencer, Granite Quarry, Rockwell, Faith, Cleveland, China Grove, and Landis shall vote to approve the service extension into each respective municipality before Salisbury can provide service to that municipality. The Rowan County Board of County Commissioners shall vote to approve service extension to any governmental economic development site, governmental facility, school, or college owned by Rowan County. The Rowan Salisbury School Board shall also vote to approve service extension to schools.

c. For the city of Wilson, the service area is the county limits of Wilson County, including the incorporated areas within the County.

d. For all other cities or joint agencies offering communications service, the service area is the area designated in the map filed as part of the initial notice of franchise with the Secretary of State as of January 1, 2011.

(d) The exemptions provided in this section do not exempt a city or joint agency from laws and rules of general applicability to governmental services, including nondiscriminatory obligations.

(e) In the event a city subject to the exemption set forth in subsection (c) of this section provides communications service to a customer outside the limits set forth in that subsection, the city shall have 30 days from the date of notice or discovery to cease providing service to the customer without loss of the exemption.

"§ 160A-340.3. Notice; public hearing.

A city or joint agency that proposes to provide communications service shall hold not fewer than two public hearings, which shall be held not less than 30 days apart, for the purpose of gathering information and comment. Notice of the hearings shall be published at least once a week for four consecutive weeks in the predominant newspaper of general circulation in the area in which the city is located. The notice shall also be provided to the North Carolina Utilities Commission, which shall post the notice on its Web site, and to all companies that have requested service of the notices from the city clerk. The city shall deposit the notice in the U.S. mail to companies that have requested notice at least 45 days prior to the hearing subject to the notice. Private communications service providers shall be permitted to participate fully in the public hearings by presenting testimony and documentation relevant to their service offerings and the city's plans. Any feasibility study, business plan, or public survey conducted or prepared by the city in connection with the proposed communications service project is a public record as defined by G.S. 132-1 and shall be made available to the public prior to the public hearings required by this section. This section does not apply to the repair, rebuilding, replacement, or improvement of an existing communications network, or equipment relating thereto.

"§ 160A-340.4. Financing.

(a) A city or joint agency subject to the provisions of G.S. 160A-340.1 shall not enter into a contract under G.S. 160A-19 or G.S. 160A-20 to purchase or to finance the purchase of property for use in a communications network or to finance the construction of fixtures or improvements for use in a communications network unless it complies with subsection (b) of this section. The provisions of this section shall not apply to the repair, rebuilding, replacement, or improvement of an existing communications network, or equipment relating thereto.

(b) A city shall not incur debt for the purpose of constructing a communications system without first holding a special election under G.S. 163-287 on the question of whether the city may provide communications service. If a majority of the votes cast in the special election are for the city providing communications service, the city may incur the debt for the service. If a majority of the votes cast in the special election are against the city providing communications service, the city shall not incur the debt. However, nothing in this section shall prohibit a city from revising its plan to offer communications service and calling another special election on the question prior to providing or offering to provide the service. A special election required under Chapter 159 of the General Statutes as a condition to the issuance of bonds shall satisfy the requirements of this section.

"§ 160A-340.5. Taxes; payments in lieu of taxes.

(a) A communications network owned or operated by a city or joint agency shall be exempt from property taxes. However, each city possessing an ownership share of a communications network and a joint agency owning a communications network shall, in lieu of property taxes, pay to any county authorized to levy property taxes the amount which would be assessed as taxes on real and personal property if the communications network were otherwise subject to valuation and assessment. Any payments in lieu of taxes shall be due and shall bear interest, if unpaid, as in the case of taxes on other property.

(b) A city-owned communications service provider shall pay to the State, on an annual basis, an amount in lieu of taxes that would otherwise be due the State if the communications service was provided by a private communications service provider, including State income, franchise, vehicle, motor fuel, and other similar taxes. The amount of the payment in lieu of taxes shall be set annually by the Department of Revenue and shall approximate the taxes that would be due if the communications service was undertaken by a private communications service provider. A city-owned communications service provider must provide information requested by the Secretary of Revenue necessary for calculation of the assessment. The Department must inform each city-owned communications service provider of the amount of the assessment by January 1 of each year. The assessment is due by March 15 of each year. If the assessment is unpaid, the State may withhold the amount due, including interest on late payments, from distributions otherwise due the city under G.S. 105-164.44I.

(c) A city-owned communications service provider or a joint agency that provides communications service shall not be eligible for a refund under G.S. 105-164.14(c) for sales and use taxes paid on purchases of tangible personal property and services related to the provision of communications service, except to the extent a private communications service provider would be exempt from taxation.

"**§ 160A-340.6. Public-private partnerships for communications service.**

(a) Prior to undertaking to construct a communications network for the provision of communications service, a city shall first solicit proposals from private business in accordance with the procedures of this section.

(b) The city shall issue requests for proposals that specify the nature and scope of the requested communications service, the area in which it is to be provided, any specifications and performance standards, and information as to the city's proposed participation in providing equipment, infrastructure, or other aspects of the service. The city may prescribe the form and content of proposals and may require that proposals contain sufficiently detailed information to allow for an objective evaluation of proposals using the factors stated in subsection (d) of this section. Each proposal shall at minimum contain all of the following:

(1) Information regarding the proposer's experience and qualifications to perform the requirements of the proposal.

(2) Information demonstrating the proposer's ability to secure financing needed to perform the requirements of the proposal.

(3) Information demonstrating the proposer's ability to provide staffing, implement work tasks, and carry out all other responsibilities necessary to perform the requirements of the proposal.

(4) Information clearly identifying and specifying all elements of cost of the proposal for the term of the proposed contract, including the cost of the purchase or lease of equipment and supplies, design, installation, operation, management, and maintenance of any system, and any proposed services.

(5) Any other information the city determines has a material bearing on its ability to evaluate the proposal.

(c) The city shall provide notice that it is requesting proposals in accordance with this subsection. The notice shall state the time and place where plans and specifications for the proposed service may be obtained and the time and place for opening proposals. Any notice given under this subsection shall reserve to the city the right to reject any or all proposals. Notice of request for proposals shall be given by all of the following methods:

(1) By mailing a notice of request for proposals to each firm that has obtained a license or permit to use the public rights-of-way in the city to provide a

communications service within the city by depositing such notices in the U.S. mail at least 30 days prior to the date specified for the opening of proposals. In identifying firms, the city may rely upon lists provided by the Office of the Secretary of State and the North Carolina Utilities Commission.

(2) By posting a notice of request for proposals on the city's Web site at least 30 days before the time specified for the opening of proposals.

(3) By publishing a notice of request for proposals in a newspaper of general circulation in the county in which the city is predominantly located at least 30 days before the time specified for the opening of proposals.

(d) In evaluating proposals, the city may consider any relevant factors, including system design, system reliability, operational experience, operational costs, compatibility with existing systems and equipment, and emerging technology. The city may negotiate aspects of any proposal with any responsible proposer with regard to these factors to determine which proposal is the most responsive. A determination of most responsive proposer by the city shall be final.

(e) The city may negotiate a contract with the most responsive proposer for the performance of communications service specified in the request for proposals. All contracts entered into pursuant to this section shall be approved and awarded by the governing body of the city.

(f) If the city is unable to successfully negotiate the terms of a contract with the most responsive proposer within 60 days of the opening of the proposals, the city may proceed to negotiate with the firm determined to be the next most responsive proposer if such a proposer exists. If the city is unable to successfully negotiate the terms of a contract with the next most responsive proposer within 60 days, it may proceed under this Article to provide communications service.

(g) All proposals shall be sealed and shall be opened in public. Provided, that trade secrets shall remain confidential as provided under G.S. 132-1.2."

SECTION 1.(b) G.S. 105-164.14 is amended by adding a new subsection to read:

"(d2) A city subject to the provisions of G.S. 160A-340.5 is not allowed a refund of sales and use taxes paid by it under this Article for purchases related to the provision of communications service as defined in Article 16A of Chapter 160A of the General Statutes."

SECTION 1.(c) Subsection (b) of this section is effective when it becomes law and applies to sales made on or after that date.

SECTION 2.(a) G.S. 62-3(23) is amended by adding the following new sub-subdivision to read:

"l. The term "public utility" shall include a city or a joint agency under Part 1 of Article 20 of Chapter 160A of the General Statutes that provides service as defined in G.S. 62-3(23)a.6. and is subject to the provisions of G.S. 160A-340.1."

SECTION 2.(b) This section shall not be construed to change the regulatory nature of or requirements applicable to any particular service currently regulated by the Commission under Chapter 62 of the General Statutes.

SECTION 3. Subchapter IV of Chapter 159 of the General Statutes is amended by adding a new Article to read as follows:

"Article 9A.

"Borrowing by Cities for Competitive Purposes."§ 159-175.10. Additional requirements for review of city financing application; communications service.

The Commission shall apply additional requirements to an application for financing by a city or a joint agency under Part 1 of Article 20 of Chapter 160A of the General Statutes for the construction, operation, expansion, or repair of a communications system or other infrastructure for the purpose of offering communications service, as that term is defined in G.S. 160A-340(2), that

is or will be competitive with communications service offered by a private communications service provider. This section does not apply to the repair, rebuilding, replacement, or improvement of an existing communications network, or equipment relating thereto, but does apply to the expansion of such existing network. The additional requirements are the following:

(1) Prior to submitting an application to the Commission, a city or joint agency shall comply with the provisions of G.S. 160A-340.3 requiring at least two public hearings on the proposed communications service project and notice of the hearings to private communications service providers who have requested notice.

(2) At the same time the application is submitted to the Commission, the city or joint agency shall serve a copy of the application on each person that provides competitive communications service within the city's jurisdictional boundaries or in areas adjacent to the city. No hearing on the application shall be heard by the Commission until at least 60 days after the application is submitted to the Commission.

(3) Upon the request of a communications service provider, the Commission shall accept written and oral comments from competitive private communications service providers in connection with any hearing or other review of the application.

(4) In considering the probable net revenues of the proposed communications service project, the Commission shall consider and make written findings on the reasonableness of the city or joint agency's revenue projections in light of the current and projected competitive environment for the services to be provided, taking into consideration the potential impact of technological innovation and change on the proposed service offerings and the level of demonstrated community support for the project.

(5) The city or joint agency making the application to the Commission shall bear the burden of persuasion with respect to subdivisions (1) through (4) of this section."

SECTION 4. G.S. 159-81(3) is amended by adding a new sub-subdivision to read:

"q. Cable television systems."

SECTION 5. Sections 2, 3, and 4 of this act do not apply to a city or joint agency providing communications service as of January 1, 2011, provided the city or joint agency limits the provision of communications service as provided in G.S. 160A-340.2(c). In the event a city subject to the exemption set forth in this section provides communications service to a customer outside the limits set forth in G.S. 160A-340(c), the city shall have 30 days from the date of notice or discovery to cease providing service to the customer without loss of the exemption.

SECTION 6. Any city that is designated as a public utility under Chapter 62 of the General Statutes when this act becomes law shall not be subject to the provisions of this act with respect to any of its operations that are authorized by that Chapter.

SECTION 7. If any provision of this act or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of this act which can be given effect without the invalid provision or application, and to that end the provisions of this act are declared to be severable.

SECTION 8. Except as otherwise provided, this act is effective when it becomes law and applies to the provision of communications service by a city or joint agency under Part 1 of Article 20 of Chapter 160A of the General Statutes on and after that date.

In the General Assembly read three times and ratified this the 9th day of May, 2011.

s/ Philip E. Berger
President Pro Tempore of the Senate

s/ Dale R. Folwell
Speaker Pro Tempore of the House of Representatives

This bill having been presented to the Governor for signature on the 10th day of May, 2011 and the Governor having failed to approve it within the time prescribed by law, the same is hereby declared to have become a law. This 21st day of May, 2011.

s/ Karen Jenkins
Enrolling Clerk